purchaser of property for value which transaction is not tainted with fraud, misrepresentation, forgery and unlawful acquiring of title or interest. Given facts of the present case do not afford the defendants the legal protection simply because the agreement is a friendly loan agreement executed between the plaintiff as borrower and the late Muthusamy as the friendly lender and the indefeasibility of the title of the registered owners has not been defeated by the land having been transferred and registered in the name of the 2nd defendant without the consent and knowledge of all the beneficiaries who are equally entitled to the ownership of the said property especially if such transfer of ownership was not in compliance with the provisions of ss. 39(1) & s. 60(1), (2), (3) and (4) of the Probate and Administration Act 1959.

(4) At the time of the transfer and registration of the ownership of the said property from the estate of Lim Hock Seng to the 2nd defendant the defendants' rights under the 1958 agreement have not arisen because no grant of L.A. was obtained by the plaintiff yet and also a Court order of sale and transfer had yet to be obtained. This transfer and registration exercise was premature and void for want of legal rights because no notice was given to and consent obtained from all the beneficiaries of the administration of the estate of Lim Hock Seng. In short no one can enjoy a right when no right is bestowed upon oneself.

I order the above terms as prayed with costs.

**MAJUKAYU SDN. BHD. & ANOR.**

**v.**

**WONG PEK SHONG & ANOR.**

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-29-92(92)]
11 DECEMBER 1993

***PRACTICE AND PROCEDURE: Setting aside judgment by default - Summons served on both defendants - Notice of appearance and statement of defence not filed - Application to set aside default judgment was dismissed by Sessions Judge - Whether affidavits of appellants disclose a defence on the merits or an arguable or triable issue.***

This was an appeal against the decision of the Sessions Court, Lenggong which dismissed an application by the appellants to set aside the default judgment given on 12 November 1991. Hence, this appeal.

**Held:**

**[1]** The question for this Court to consider is whether the affidavits of the appellants as set out above disclose a defence on the merits or an arguable or triable issue.

**[2]** Failure to file the statement of defence should not be an obstacle to set aside the default judgment. The Sessions Judge failed to consider the defence of the appellants as shown in the affidavits. Sufficient reasons were advanced for the appellants' absence on 12 November 1991 but unfortunately they were rejected by the Sessions Judge.

**[3]** The affidavits of the appellants has shown a defence on the merits or at least there is an arguable case or an issue which should go for trial, the appellants' appeal was allowed.

**[4]** The appellants were given an enlargement of time to file their defence within three weeks from the date of this judgment.

*[Appeal allowed. Default judgment set aside. Enlargement of time given to file statement of defence. Appellants to pay costs of appeal].*

**Cases referred to:**

*Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors. [1986] 1 MLJ 315* ***(cit)***

*Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1986] 1 MLJ 348* ***(cit)***

*Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors. [1988] 1 MLJ 188* ***(cit)***
*Evans v. Bartlam [1937] AC 473* ***(foll)***
*Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23 FC* ***(foll)***
*B. Dialdas & Co. (Pte) Ltd. v. Sin Sin & Co. & Ors. [1984] 2 MLJ 223* ***(cit)***
*Ng Fook Hiong v. Arunachalam Chettiar [1967] 1 MLJ 25* ***(cit)***

**Legislation referred to:**
Rules of the High Court 1980, O. 14
Subordinate Courts Rules 1980, O. 28 r. 8(1), (2)

*For the appellants - Harlina bt Hamidi @ Abdul Rani; M/s. Maxwell, Kenion, Cowdy & Jones*
*For the respondents - Lim; M/s. Sri Ling & Associates*

**JUDGMENT**

**Haji Abdul Malik bin Haji Ishak JC:**
On 12 November 1991 the Sessions Court, Lenggong, Perak entered default judgment against the appellants. The appellants then applied unsuccessfully on 9 June 1992 to set aside that default judgment. It is from this decision that the appeal before me now lies.

The record shows that the statement of claim was served on the first appellant on 11 July 1991 and on the second appellant on 12 July 1991. The case came up for mentions on 6 August 1991, 10 September 1991 and 15 October 1991. On these dates, both parties attended Courts. On 15 October 1991, both parties were informed of the next mention date, that was on 12 November 1991. The respondents' Counsel sent an AR registered letter dated 24 October 1991 informing and alerting the Insurance Company that they had instructions to obtain judgment in default in the absence of the Insurance Company or its representative on 12 November 1991. This AR registered letter was copied not only to the Court but also to both appellants. Unfortunately, on 12 November 1991 only the respondents turned up in Court. At that juncture, the appellants did not enter an appearance nor file their statement of defence. In the circumstances, the respondents' Counsel asked for and obtained judgment in default to be entered in favour of his clients and an order to that effect was made accordingly. In doing so, the Sessions Judge was acting within the scope and ambit of his powers since both the appellants were absent.

On 9 June 1992, the Sessions Judge heard the appellants' application to set aside the default judgment under the provisions of O. 28 r. 8(1) of the Subordinate Courts Rules 1980 which reads:

> Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.

And since there was delay in complying with the provisions of O. 28 r. 8(2) of the Subordinate Courts Rules 1980, the appellants applied for enlargement of time.

In dismissing the appellants' application with costs, the Sessions Judge had this to say:

> Penghakiman ingkar ini telah diberi kepada plaintiff pada 12 November 1991 atas alasan kedua-dua defendan telah tidak hadir dan mereka juga telah gagal untuk memfailkan Penyata Pembelaan walaupun saman telah diserahkan terhadap (mereka).
> (emphasis added).

Mr. V. Vijaya Segaran, Counsel for both appellants, in his affidavit affirmed on 8 February 1992 explained why the default judgment was suffered to be entered. It was averred that Messrs. Maxwell, Kenion, Cowdy & Jones were retained to represent the appellants sometime in December 1991. Consequently, on 7 December 1991 a notice of appearance was entered and an attempt was made to serve it on the respondents' Counsel. The latter refused to accept service of the notice of appearance. It was averred that Messrs. Maxwell, Kenion, Cowdy & Jones were informed by the appellants that the next mention date was fixed on 10 December 1991 and, in pursuance of this, they wrote a letter dated 7 December 1991 (exhibit "VVSI") to the respondents' Counsel wherein they sought a further mention date in four (4) weeks time to enable them to file the statement of defence. By letter dated 8 January 1992 the respondents' Counsel informed the appellants' Counsel that judgment in default was obtained on 12 November 1991 and that a hearing date for assessment of damages was fixed on 10 December 1991 (exhibit "VVS2"). It was averred that the appellants who were present during the previous mention dates, were not able to appreciate the magnitude and seriousness of the Court proceedings. It was further averred that the appellants had a defence on the merits and gave particulars therein especially the allegations that the collision between the two vehicles were from opposite directions and that the first respondent while driving motor

car no: JQ 4334 had collided into the rear tyre of motor lorry no. AV 3296 driven by the second appellant. Such collision was said to be due to the negligence of the second respondent. The deponent averred that he sought to institute counterclaim for damages against the respondents.

The second appellant affirmed a supporting affidavit on 27 March 1992 confirming the contents of Mr. V. Vijaya Segaran's affidavit especially that part about his failure to realise the magnitude and seriousness of the Court proceedings.

Mr. Ling Yoke Tek, Counsel for the respondents affirmed an affidavit dated 2 June 1992 on behalf of the respondents. Briefly, it was averred that they refused to accept service of the appellants' Counsel's notice of appearance for two reasons. Firstly, a default judgment was already obtained on 12 November 1991 and, secondly, to accept service of the notice of appearance would complicate matters. It was deposed that there was a failure to expeditiously set aside the default judgment and, further, there was a failure to file the statement of defence.

In my view, solicitors should be discouraged from filing contentious affidavits or affidavits where there are disputed questions of facts (*Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors.* [1986] 1 MLJ 315 and *Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1986] 1 MLJ 348). But the Rules of the High Court 1980, do not, for example, prohibit a solicitor from filing an affidavit in support of an O. 14 application provided that the requirements contained therein are complied with (*Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors.* [1988] 1 MLJ 188). In the present appeal, although the issue revolves on the question of setting aside default judgment, in my opinion, both the affidavits of the solicitors are relevant and admissible.

It is now trite law that where applications are made to set aside default but regular judgments, the rule, which has sometimes been described as "an almost inflexible rule", is that there ought to be affidavits stating facts showing a defence on the merits. In *Evans v. Bartlam* [1937] AC 473, Lord Atkin in his judgment at p. 480 said:

> ... that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence...

In *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 FC, Raja Azlan Shah Ag. CJ (Malaya) (as His Majesty then was), said:

> ... It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits ...

And to show a defence on the merits, a defendant need only disclose an arguable or triable issue (*B. Dialdas & Co. (Pte) Ltd. v. Sin Sin & Co. & Ors.* [1984] 2 MLJ 223).

The Courts are given the wide discretion to set aside default judgment. Thus, there cannot be any rigid rule governing the setting aside of default judgment. I am fortified in this proposition by a passage appearing in *Evans v. Bartlam (supra)* where Lord Atkin said:

> If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

The question for this Court to consider is whether the affidavits of the appellants as set out above disclose a defence on the merits or an arguable or triable issue.

The Sessions Judge refused to set aside the default judgment as the appellants had failed to file their statement of defence. The failure to file the statement of defence should not be an obstacle to set aside the default judgment (*Ng Fook Hiong v. Arunachalam Chettiar* [1967] 1 MLJ 25) and by adopting such an approach, the Sessions Judge had failed to consider the principles as set out in *Evans v. Bartlam (supra)* and in *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat (supra).* Sufficient reasons were advanced for the appellants' absence on 12 November 1991 but unfortunately they were rejected by the Sessions Judge. The Sessions Judge failed to consider the defence of the appellants as shown in the affidavits. The

allegations that both vehicles were travelling in opposite directions with the consequent collision of the first respondent's motorcar into the rear tyre of the motor lorry would surely, in my opinion, show a defence on the merits or at least there is an arguable case or an issue which should go for trial.

For the reasons stated above, I allow the appellants' appeal. An enlargement of time would be granted to the appellants. The appellants will file their defence within three weeks from the date of this judgment. The appellants will pay the costs of this appeal.

**PADU EHSAN SDN. BHD.**

**v.**

**BINAAN JOHANESA SDN. BHD. AND PERBADANAN KEMAJUAN NEGERI MELAKA (GARNISHEE)**

HIGH COURT, MELAKA
TUAN HAIDAR BIN MOHD NOOR J.
[CIVIL SUITS NO. 22-113-1992
& 22-114-1992]
2 AUGUST 1993

***PRACTICE AND PROCEDURE: Enforcement of judgments - Setting aside of orders nisi - Whether garnishee body entitled to protection of the Government Proceedings Act 1956 - Failure to state sum owed in application for order nisi - Whether fatal - Whether there was compliance with O. 49 r. 2 RHC 1980.***

On 30 May 1993, the Court gave judgment for damages to be paid to the plaintiff in two suits for breach of contract which were consolidated. The defendant/judgment debtor (JD) appealed against the said judgment but in the meantime, the plaintiff, judgment creditor (JC) applied for garnishee proceedings. JD now seeks to set aside the orders nisi obtained and further to stay proceedings on the execution of the judgment until the disposal of the appeal.

JD in applying to set aside the orders nisi contends that:

(a) Two of the garnishees involved, namely Majlis Perbandaran Melaka Bandaraya Bersejarah and Perbadanan Kemajuan Negeri Melaka are considered government bodies and are not subject to garnishee proceedings.
(b) In respect of the garnishees who are financial institutions, there was no sum stated in the application for the orders nisi.
(c) In respect of the rest of the garnishees, O. 49 r. 2 RHC was not complied with.
(d) The judgment order was wrongly dated.

**Held:**

**[1]** The definition of 'Government' in s. 2 of the Government Proceedings Act 1956 refers to the Federal Government and the Government of the States. 'Government' here does not include bodies established under either Federal or State laws such as the statutory bodies aforestated as garnishees in the action.